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November 30, 2004

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: *Ex parte*, Review of the Section 251 Unbundling Obligations of  
Incumbent Local Exchange Carriers, CC Docket No. 01-338; Unbundled  
Access to Network Elements, WC Docket No. 04-313

Dear Ms. Dortch:

The Promoting Active Competition Everywhere ("PACE") Coalition, Broadview Networks, and Talk America Inc., through their undersigned counsel, respectfully submit this letter in the above-referenced proceeding to address the appropriate crossover applicable to unbundled local switching, and to explain why the local switching crossover should not be used by the Commission in its definition of the "fiber carve out" that limits the loop unbundling obligations of incumbent local exchange carriers ("ILECs"). Because prior Commission orders sometimes have referred to both the local switching crossover and the fiber carve-out as defining the boundary between the "mass market" and the "enterprise market," it is important that the Commission clearly recognize here that each has a separate purpose, theory, and application.<sup>1</sup>

As explained in more detail below, local switching is used widely to provide basic voice service to traditional phone users – commonly called "plain old telephone service" ("POTS") customers. This service is distinct from the advanced services the Commission hoped to encourage by its rules limiting unbundling of broadband facilities (collectively referenced here as

<sup>1</sup> Significant confusion has resulted from the terms "mass market" and "enterprise market" being used indiscriminately to describe very different customer segments. To avoid further confusion, we purposely limit our use of these terms here.

the “fiber carve-out”).<sup>2</sup> Attempting to force a common boundary between smaller and larger customers without recognizing the fundamental differences between the basic voice and integrated voice/data markets produces absurd results, and is directly at odds with the Commission’s obligations to encourage competition in both markets. Consequently, the Commission cannot rely upon the crossover analysis that the PACE Coalition et al. presented in its comments to define its fiber-carve out,<sup>3</sup> nor can the Commission reasonably use the boundary of its fiber carve-out to limit the availability of local switching to serve POTS customers.

### **The DS-1 Crossover – Defining the Upper Boundary of the Analog Voice Market**

As explained in the Pace Coalition et al.’s comments, the analog voice (*i.e.*, POTS) market remains a core feature of the telecommunications marketplace. The voice market is central to the nation’s economy, providing the common bond that connects most families and small businesses. While the Commission’s attention also should focus on emerging advanced services (*i.e.*, integrated voice/data products) it should not do so at the expense of the voice market. Over 40% of the nation’s households still do not access the internet at *all*, while less than 20% do so through a broadband connection. Similar proportions apply in the small business market: a Small Business Administration (“SBA”) study indicates that less than ½ of small businesses have a high-speed connection, with only 4% served by a DS-1.<sup>4</sup> Moreover, it is the POTS monopoly that supplies the RBOCs with most of their financial strength.<sup>5</sup>

Local switching is central to achieving voice competition because it is the only proven method to efficiently access the analog customers that comprise the POTS market. The PACE Coalition et al. has explained that local switching should be available to serve any analog phone customer so that the *customer* itself would decide whether to leave the POTS market in favor of

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<sup>2</sup> Specifically, the Commission found that “removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market.” *Triennial Review Order*, ¶ 278. In the *MDU Reconsideration Order*, the Commission concluded that the same unbundling relief for FTTH loops also is appropriate for predominantly residential multiple dwelling units, later extending similar relief to fiber-to-the-curb (“FTTC”) loops in the *FTTC Reconsideration Order*.

<sup>3</sup> The PACE Coalition, Broadview Networks, Grande Communications, and Talk America Inc. collectively filed comments in this proceeding. For purposes of this *ex parte*, those comments are referred to as comments of the PACE Coalition et al.

<sup>4</sup> *A Survey of Small Business’ Telecommunications Use and Spending*, SBA Office of Advocacy, at 44 (Mar. 2004).

<sup>5</sup> For instance, voice service provides 67% of BellSouth’s revenues, with the residential and small business segments responsible for most of that. See BellSouth Quarterly Earnings, 3<sup>rd</sup> Q 2004 (Oct. 25, 2004). Our review of the quarterly earnings releases of the other RBOCs indicates that BellSouth is representative.

a high-speed digital (DS-1) connection.<sup>6</sup> Verizon also recommended such a market-based approach in the post-*Triennial Review Order* state impairment proceedings.<sup>7</sup>

Of particular importance here, however, is the fact that the Commission did recognize that a voice customer could require so many analog lines that the customer could be efficiently served using a DS-1. As such, the Commission directed the states to determine a “DS-1 crossover,” intended to identify the point at which a voice customer could be served using a DS-1. The PACE Coalition et al. has shown that, on average, the DS-1 crossover occurs at approximately 12 lines – a conclusion supported by a number of state-specific analyses employing separate methodologies developed by AT&T (a CLEC) and Sprint (the nation’s fourth largest ILEC).<sup>8</sup>

The DS-1 crossover analysis that the PACE Coalition provided, however, is specific to the voice market – it cannot be used to support any conclusion regarding the advanced services market. In contrast to the voice-only POTS market, the advanced services market is characterized by products that integrate voice and data. Such integrated products are not relevant to the DS-1 crossover described in the *Triennial Review Order* and calculated in the states. The local switching crossover adopted in the *Triennial Review Order* was intended to define the point where “it is economically feasible for a competitive carrier to provide voice service with its own switch using a DS1 or above loop.”<sup>9</sup> As noted, however, the Commission recognized that:

At some point, customers taking a sufficient number of multiple DS0 loops could be served in a manner similar to that described above ... that is, voice services provided over one or several DS1s...<sup>10</sup>

The *Triennial Review Order* could not have been clearer that its focus was the voice market. The rule setting forth the general methodology to be used to determine the DS-1 crossover called for a comparison between two voice configurations – DSO loops used with unbundled local switching (*i.e.*, UNE-P), in comparison to a DS-1 loop used with the carrier’s switching. These are voice architectures.

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<sup>6</sup> See Comments of the PACE Coalition et al. at 55-59.

<sup>7</sup> See *id.* at 56 & Exh. 22 (citing and appending Verizon testimony in the state proceedings held in response to the *Triennial Review Order*).

<sup>8</sup> See Comments of the PACE Coalition, et al. at 56-63.

<sup>9</sup> *Triennial Review Order*, ¶ 421, n.1296 (emphasis added).

<sup>10</sup> *Triennial Review Order*, ¶ 497 (emphasis added).

Multi-line DS0 end users. As part of the economic analysis set forth in paragraph (d)(2)(iii)(B)(3) of this section, the state commission shall establish a maximum number of DS0 loops for each geographic market that requesting telecommunications carriers can serve through unbundled switching when serving multiline end users at a single location. Specifically, in establishing this “cutoff,” the state commission shall take into account the point at which the increased revenue opportunity at a single location is sufficient to overcome impairment and the point at which multiline end users could be served in an economic fashion by higher capacity loops and a carrier’s own switching and thus be considered part of the DS1 enterprise market.<sup>11</sup>

Thus, the DS-1 crossover testimony that the PACE Coalition et al. summarized (which supports a national finding of impairment to serve any customer with 12 or fewer voice lines) is applicable only to the voice market. This perspective is appropriate because the network element being addressed – unbundled local circuit switching – is useful only to serve the customer’s voice needs. The DS-1 crossover is meaningless with respect to the advanced services market, which is defined by services that integrate voice with data into a single digital stream. Because the local switching crossover is only relevant to analog voice configurations, it should never be used to describe customers with digital voice and data needs.

### **Limiting the Fiber-Carve Out – Protecting Competition in the Integrated Advanced Services Market**

The Commission’s loop unbundling rules also strive to draw a distinction between different customer types, but for an entirely different purpose and to influence behavior in an entirely different customer segment. Concluding that there are different risks and revenue opportunities associated with deploying fiber architectures to smaller customers, the Commission limited the incumbents’ unbundling obligations for “fiber to the premises” (“FTTP”) and “fiber to the curb” (“FTTC”) arrangements. The Commission recognized, however, that no such incentives were needed to serve larger customers. The Commission has not yet addressed how it will distinguish between the “smaller customers” to which the fiber carve-out applies, and the larger customers for which no additional incentive is needed to encourage broadband deployment.<sup>12</sup>

Although the Commission has at times labeled those smaller customers affected by its fiber carve-out as “mass market” customers, it has never done so in a manner consistent with the

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<sup>11</sup> 47 C.F.R. § 51.319(d)(2)(iii)(b)(4) (emphasis added).

<sup>12</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, FCC 01-338, ¶ 2 n. 2 (rel. Oct 18, 2004) (“*FTTC Reconsideration Order*”).

term as it is used with respect to local switching. Rather, the object of the Commission's fiber carve-out is decidedly *not* a voice customer, but rather is a customer interested in triple-play voice, data and video service:

The record demonstrates that mass market FTTH loops are used almost entirely for providing broadband services (or broadband in conjunction with narrowband services) at this time, and that carriers are not deploying such loops to provide narrowband services alone.<sup>13</sup>

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The record reflects that when fiber is brought within 500 feet of a subscriber's premise, carriers can provide broadband services comparable to that provided by FTTH architecture, including data speeds of 10 megabits per second (Mbps) in addition to high definition multi-channel video services.<sup>14</sup>

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[A]s with FTTH loops, competitive LECs deploying FTTC loops have increased revenue opportunities through the ability to offer voice, multi-channel video, and high-speed data services. As the Commission found with respect to FTTH loops in the *Triennial Review Order*, the substantial revenue opportunities that arise from offering this "triple play" of services helps ameliorate many of the entry barriers presented by the costs and scale economies.<sup>15</sup>

The fact is that the very revenue opportunities that the Commission relied upon in order to find non-impairment for the "mass market customer" assumed by its fiber carve-out do not exist for the voice customer served via unbundled local switching. Nor is there any reason to formulate unbundling rules designed to encourage the deployment of local circuit switches; the ILECs already have deployed such switches ubiquitously, and the Commission has granted unbundling relief to next generation switches. There is simply no nexus between the DS-1 crossover used to define the point at which a voice customer might be economically served by a DS-1, and the completely different profile of a customer obtaining multi-megabit voice/data/video service over a FTTP or FTTC loop architecture.

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<sup>13</sup> *Triennial Review Order*, ¶ 274.

<sup>14</sup> *FTTC Reconsideration Order*, ¶ 10.

<sup>15</sup> *Id.* ¶ 11 (citations omitted).

**Attempting to Force the Same “Mass Market” Definition on the POTS and Advanced Services Markets Produces Absurd Results**

As explained above, the Commission’s unbundling rules for loops and local switching apply to fundamentally different market segments. The DS-1 crossover reasonably defines the upper boundary of the voice mass market while the Commission’s broadband policies are intended to provide limited unbundling relief to incumbents deploying fiber to compete in an integrated voice/data/video market. It is not possible to craft a single definition of the “mass market” that correctly distinguishes between “mass market *voice*” and “mass market *advanced-services*” customers. To do so produces absurd results in one or the other markets (or both).

Consider the effect of a determination that the appropriate boundary is a DS-1. Such a conclusion would clearly be reasonable in the context of local switching, because it would recognize the differing levels of impairment associated with providing a customer with voice service using analog loops and providing service using a DS-1. In the context of the Commission’s broadband policies, however, wherever a FTTP or FTTC loop is deployed, CLECs would be unable to offer integrated voice/data services to customers currently served by less than a DS-1. This would produce the absurd result that CLECs could not offer DS-1 level service to customers that do not *already* have a DS-1 service, despite the fact that one of the most important roles of the CLEC community has been to *introduce* customers to more efficient integrated DS-1 products that the ILEC had no incentive to offer.<sup>16</sup>

On the other hand, the Commission’s fiber carve-out policies are based on revenue opportunities—in particular, combinations of voice, data, and video—that have relevance only to the residential and home-office markets. If the Commission were to impose this definition on the analog voice market served by unbundled local switching (for instance, denying entrants the ability to use switching to serve customers with more than one line), the Commission would gut competition in the small business voice market where it takes twelve lines (at least) to justify a DS-1. According to a recent study by Dun and Bradstreet, less than 2% of the small business lines (defined here as locations with 12 lines or less) are single-line locations.<sup>17</sup>

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<sup>16</sup> Adopting any policy that frustrates CLEC efforts to assist customers in crossing the digital divide (by moving customers with multiple analog lines and separate data to integrated broadband offerings) is directly contrary to the Commission’s mandate under section 706 to promote advanced services.

<sup>17</sup> See Letter to Marlene Dortch, Secretary, Federal Communications Commission, from William Courter, Assistant General Counsel, McLeod USA, WC Docket No. 04-313 (Nov. 22, 2004) (“D&B Study”).

Conversely, if the Commission were to adopt a definition that *assumed* the customer always has data (thereby lowering the crossover), it would be punishing the analog-voice customer for desiring traditional phone service, albeit a phone service offered by a competitor. It is impossible to square such results with an Act intended to promote competition for all customer segments.

Finally, adopting a DS-1 crossover at twelve lines for purposes of an impairment analysis applicable to the analog voice market<sup>18</sup>—while using a different boundary to define the upper limit of the Commission’s fiber carve-out—is entirely consistent with the Commission’s goal to encourage broadband deployment. By promoting competition in the traditional POTS market, the incumbent would face additional competitive pressures to offer voice/data/video bundles that entrants offering POTS-only services could not match. In addition, by assuring other CLECs continued access to DS-1 loops to reach smaller business customers with more reasonably priced (and better supported) integrated products, the Commission would be encouraging a greater expansion of broadband to this sector. The result would be continued POTS competition,<sup>19</sup> growing competition for integrated voice/data services to the business market, as well as encouraging the deployment of networks capable of supporting the triple play of voice/data/video.

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<sup>18</sup> The PACE Coalition, Broadview Networks, and Talk America continue to recommend that local switching be available to serve any analog voice customer. As explained in the initial comments of the PACE Coalition et al. and as discussed above, such a market-based approach permits the customer to decide what type of service it desires, which is precisely the type of economic freedom the Commission should encourage.

<sup>19</sup> The McLeod D&B Study confirms the PACE Coalition’s estimate that adopting a crossover at twelve lines would prevent CLECs from using unbundled local switching to serve more than 50% of the business lines.

Marlene H. Dortch  
November 30, 2004  
Page Eight

Please contact the undersigned if you have any questions regarding this *ex parte*.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jennifer M. Kashatus".

Genevieve Morelli  
Jennifer M. Kashatus

cc: Christopher Libertelli  
Scott Bergmann  
Matt Brill  
Dan Gonzalez  
Jessica Rosenworcel  
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